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Supreme Court of the United States

October Term, 1976

Docket No. 76- 76-1762

ERROL JAY MIRMELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Questions Presented 3

Statutory Provisions Involved 3

Statement of the Case 8

I. Suppression Testimony 8

II. Trial Testimony 10

ARGUMENT:

POINT I: The Court in this case should review the Order of the Third Circuit Court of Appeals affirming the Judgment of Conviction in the District Court since the effect of the District Court's Opinion upholding the search performed by the Customs agents is to permit such agents to act far outside the scope of their statutory authority 12

POINT II: The District Court's Opinion, affirmed by the Third Circuit Court of Appeals, is in direct conflict with this Court's holdings in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 14

Conclusion 23

CASES CITED:

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 2, 14, 15, 16, 19, 20

TABLE OF CONTENTS

CASES CITED:

Terry v. Ohio,
392 U.S. 1 (1968) 18

United States v. Beck,
483 F.2d 203 (3d Cir. 1973), cert. den.,
414 U.S. 1132 (1974) 15

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 2, 14, 17, 18, 19

United States v. Ferrone,
413 F. Supp. 408 (D.C. Puerto Rico 1975) 14

United States v. Glaziou,
402 F.2d 8, (2d Cir. 1968) cert. den. 393
U.S. 1121 (1969) 15

United States v. Haala,
Cir. 532 F.2d 1324 (10th Cir. 1976), reh. den.
532 F.2d 1324 (1976) 22

United States v. Tilton,
534 F.2d 1363 (9th Cir. 1976) reh. den.
534 F.2d 1363 (1976) 20, 21, 22

RULE CITED:

S. Ct. Rule 19 2

REGULATIONS CITED:

8 C.F.R. §287.1 19

19 C.F.R. §1.2 15

19 C.F.R. §6.13 15

19 C.F.R. §162.3 ..... 6, 13

19 C.F.R. §162.5 ..... 7, 13, 20

19 C.F.R. §162.7 ..... 7, 12, 13

FEDERAL CODES CITED:

8 U.S.C. §1357(a) 19
18 U.S.C. §1952 2
19 U.S.C. §1401(a)(b) 6, 13
19 U.S.C. §482 and §1581 ..... 3, 4, 12, 13, 20
21 U.S.C. §841(a)(1) 1
28 U.S.C. §1254(1) 2

APPENDIX

Appendix A 1a
Appendix B 16a

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Docket No. 76-

ERROL JAY MIRMELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit. The judgment of the Court of Appeals affirmed the judgment of conviction entered in the United States District Court for the District of New Jersey against defendant Mirmelli for possession of marijuana with intent to distribute and for travel in interstate commerce to do an unlawful act, and affirmed the District Court's order and opinion upholding the validity of the airport search by customs agents which produced the marijuana which was the subject of the indictment.

OPINIONS BELOW

The trial court's opinion upholding the search is reported at 421 F. Supp. 684 (D.N.J. 1976) and is attached hereto as Appendix A. The Court of Appeals for the Third Circuit affirmed without opinion. Its judgment order is attached hereto as Appendix B.

JURISDICTION

Defendant was indicted by a federal grand jury sitting in and for the District of New Jersey on March 30, 1976. He was charged in two separate counts with violations of Title 21, United States Code, section 841(a)(1) (possess-

ing marijuana with intent to distribute) and Title 18, United States Code, section 1952 (traveling in interstate commerce to do an unlawful act).

On April 29, 1976, defendant filed a motion to suppress the marijuana as evidence. An evidentiary hearing was held on May 24 and 25, 1976. The motion was denied from the bench on May 25, 1976; an opinion was rendered on July 23, 1976. Trial was moved before a jury on June 8 and 9, 1976, resulting in a conviction of defendant on both counts of the indictment. Defendant was sentenced to a maximum five-year term of imprisonment on Count I, to a concurrent five-year term on Count II and a $5,000 fine. Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on August 6, 1976, and on May 6, 1977 that court entered a judgment order affirming the conviction without opinion. This Court's jurisdiction is founded upon 28 U.S.C. §1254(1).

There are special and important reasons why, in the exercise of sound judicial discretion, a writ of certiorari should be granted in this case. (S.Ct. *Rule* 19). First of all, by affirming the judgment of conviction of the District Court, the Court of Appeals for the Third Circuit has given its approval to a broad and far-ranging ability of customs officers to act far in excess of the authority given them by statute. Secondly, the definition of "functional equivalent of a border" and the standard required for a border search affirmed by the judgment of the Third Circuit of Appeals is in direct conflict with this Court's holdings in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the judgment of conviction of the District Court, insofar as that affirmance upheld the District Court's conclusion that a local airport, even when accepting a domestic flight, was the functional equivalent of a border?

2. Did the Court of Appeals err in affirming the judgment of conviction of the District Court, insofar as that affirmance upheld the District Court's conclusion that customs agents had the statutory and legal authority to conduct a border search even where the agents admittedly did not know, prior to the inception of the search, whether the aircraft or its cargo had come from a foreign destination?

3. Did the Court of Appeals err in affirming the judgment of conviction of the District Court, insofar as that affirmance upheld the District Court's conclusion that the customs agents had met the requisite standards for a border search?

STATUTORY PROVISIONS INVOLVED

Section 482 of Title 19, United States Code, provides as follows:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or

about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. §3061.

Section 1581 of Title 19, United States Code, provides as follows:

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

(b) Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

(c) Any master of a vessel being examined as herein provided, who presents any forged, altered, or false document or paper to the examining officer, knowing the same to be forged, altered, or false and without revealing the fact shall, in addition to any forfeiture to which in consequence the vessel may be subject, be liable to a fine of not more than $5,000 nor less than $500.

(d) Any vessel or vehicle which, at any authorized place, is directed to come to a stop by any officer of the

customs, or is directed to come to a stop by signal made by any vessel employed in the service of the customs and displaying proper insignia, shall come to a stop, and upon failure to comply, a vessel or vehicle so directed to come to a stop shall become subject to pursuit and the master, owner, operator, or person in charge thereof shall be liable to a penalty of not more than $5,000 nor less than $1,000.

(e) If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who has engaged in such breach shall be arrested.

(f) It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.

(g) Any vessel, within or without the customs waters, from which any merchandise is being, or has been, unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed to be employed within the United States and, as such, subject to the provisions of this section.

(h) The provisions of this section shall not be construed to authorize or require any officer of the United States to enforce any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or

permitted under special arrangement with such foreign government. June 17, 1930, c. 497, Title IV, §581, 46 Stat. 747; Aug. 5, 1935, c. 438, Title II, §203, 49 Stat. 521; 1946 Reorg. Plan No. 3, §§101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; Sept. 1, 1954, c. 1213, Title V, §504, 68 Stat. 1141.

Sections 1401(a) and (b) of Title 19, United States Code, provide as follows:

When used in this subtitle or in Part I of Subtitle II of this chapter—

Vessel

(a) The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

Vehicle

(b) The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

Section 162.3 of Title 19, Code of Federal Regulations, provides as follows:

(a) *General authority.* A Customs officer for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:

(1) Any vessel at any place in the United States or within the Customs waters of the United States;

(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States; or

(3) Any vessel within a Customs-enforcement area designated such under the provisions of the Anti-Smuggling Act (Act of August 5, 1935, as amended, 49 Stat.

517; 19 U.S.C. 1701, 1703-1711), but Customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign government, or in the absence of a special arrangement with the foreign government concerned.

(b) *Search of army or navy transport.* If the district director or special agent in charge believes that sufficient grounds exist to justify a search of any army or navy transport, the facts shall be reported to the commanding officer or master of such transport with a request that he cause a full search to be made, and advise the district director or special agent in charge of the result of such search. If, after the cargo has been discharged, passengers and their baggage landed, and the baggage of officers and crewmembers examined and passed, the district director or special agent in charge believes that sufficient grounds exist to justify the continuance of Customs supervision of the vessel, the commanding officer of the vessel shall be advised accordingly.

(Sec. 455, 581, 46 Stat. 716, as amended, 747, as amended; 19 U.S.C. 1455, 1581).

Section 162.5 of Title 19, Code of Federal Regulations, provides as follows:

A Customs officer may stop any vehicle and board any aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft.

(Sec. 581, 46 Stat. 747, as amended, sec. 1109, 72 Stat. 799, as amended; 19 U.S.C. 1581, 49 U.S.C. 1509).

Section 162.7 of Title 19, Code of Federal Regulations, provides as follows:

A Customs officer may stop, search, and examine any vehicle, person or beast, or search any trunk or envelope wherever found, in accordance with section 3061 of the Revised Statutes (19 U.S.C. 482).

STATEMENT OF THE CASE

I. *Suppression Testimony*

On March 22, 1976 defendant landed an aircraft at Teterboro Airport in Teterboro, New Jersey some time around 1:30 P.M. in the afternoon (S. Tr. 69, L.26, A77a).* At some time after 2:00 P.M. on March 22, Inspector Schilizzi, a customs officer, looked out his window at the Atlantic Aviation Building located at Teterboro Airport and observed defendant's plane (S. Tr. 6, L.15 to L.17, A14a; 8, L.2 to L.12, A16a). As Inspector Schilizzi viewed defendant's aircraft, he observed cartons in the process of being unloaded from the plane into a van which had pulled up nearby (S. Tr. 6, L.10, A14a). Inspector Schilizzi testified that he considered the unloading unusual because the aircraft was a passenger plane and the men were working quickly (S. Tr. 6, L.24 to S. Tr. 9, L.8, A14a-17a). Inspector Schilizzi then stated to Inspectors O'Leary and Wood, who were in the office with him, that they ought to go down and "check out" the aircraft. The purpose of "checking out" the aircraft was to determine "if this was a foreign arrival or whatever it was" (S. Tr. 9, L.18 to L.23, A17a). The inspectors then went downstairs to determine the origin of the flight (S. Tr. 10, L.8, A18a).

As they approached the aircraft, the agents advised defendant that they were customs inspectors and asked where defendant was from. The defendant responded that he was from "Ocala," Florida (S. Tr. 13, L.19 to L.23, A21a). The defendant was then asked what was in the cartons and responded that they contained ceramics (S. Tr. 14, L.6. A22a). After requesting invoices and documentation to "prove what was in the cargo" and

* "S. Tr." refers to Suppression Hearing testimony, May 24-25, 1976; "A" references are to the Appendix filed with the Court of Appeals.

"if it was domestic cargo or what" (S. Tr. 14, L.16 to L.18, A22a), the agents, having been told by the defendant that he had no such invoices, asked to have one of the cartons opened up. The defendant refused the request, as he did on several further occasions, indicating that the ceramics were the property of his boss and that he could not open a box without his boss' permission (S. Tr. 16, L.2 to L.9, A24a; S. Tr. 19, L.5 to L.9, A27a).

In the interim, the agents took from the defendant his driver's license, brought it up to their office and had it "TECSed," explaining that the latter phrase meant that the information on the driver's license was put through the Treasury Enforcement Communication System. The results were "negative" (S. Tr. 17, L.19 to L.25, A25a; S. Tr. 18, L.1 to L.13, A26a). The agents then called their supervisor to determine if they should search the cartons on the plane (S. Tr. 20, L.2 to L.7, A28a). The defendant, having made a telephone call at approximately the same time in order to obtain the permission of his boss to open the boxes, indicated that they were not going to wait for that call, asked the defendant to open a carton, which defendant refused to do, and then opened the carton themselves (S. Tr. 22, L.5 to L.15, A30a).

Inspector Schilizzi testified that while he had made efforts to check defendant's license and identification, he did not attempt to confirm with the FAA where the aircraft had come from (S. Tr. 24, L.4 to L.10, A32a). He also testified that he did not check with the air tower to determine the flight's origin (S. Tr. 25, L.1 to L.4, A33a). Inspector Schilizzi further testified that when he started out from his office he had available to him only the fact that men were unloading a plane which in some way attracted his attention (S. Tr. 31, L.1 to L.6, A39a) and that the freight was "either foreign or domestic" and "it

had to be proven to us" whether it was domestic (S. Tr. 30, L.4 to L.14, A38a). The agent testified with regard to the customs agents that "as far as we're concerned all cargo we see is foreign. Unless proven that it is domestic" (S. Tr. 48, L.23 to L.24, A56a).

II. *Trial Testimony*

On March 22, 1976, defendant took off from Opa Locka Airport in the State of Florida at 8:52 A.M. eastern standard time. The take-off of the aircraft was visually seen and verified by the Air Traffic Control Tower and the aircraft, pursuant to its recorded flight plan headed north towards Palm Beach, Florida (Stipulation of Counsel Tr. 17, L.16 to L.25; Tr. 18, L.1 to L.4, June 9, 1976, Charge of the Court, A229a-230a). The aircraft landed at Teterboro Airport at 1:12 P.M. on March 22, 1976 (Tr. 6, L.1 to L.5, June 8, 1976).*

Inspector Schilizzi, in his office at the Atlantic Aviation Building at Teterboro Airport, saw defendant's plane in the process of unloading cartons which were then placed into a van at some time after 2:00 P.M. (Tr. 23, L.25, Tr. 24, L.1 to L.13, June 8, 1976). Inspector Schilizzi testified that his suspicion was aroused because the aircraft was a passenger plane and was unloading cartons (Tr. 24, L.13 to L.16, June 8, 1976). The inspectors then decided to go down and "check out" the aircraft. As the inspectors approached the aircraft, defendant came forward to meet them, answering in response to the inspector's question that he was in charge, that he was the pilot of the plane (Tr. 26, L.13 to L.24, Tr. 27, L.4 to L.5, June 8, 1976).

The first question which Inspector Schilizzi asked defendant was where he was from, the defendant answering that he was from Florida (Tr. 27, L.6 to L.9, June 8,

* "Tr." refers to transcript of trial testimony of noted date.

1976). The inspectors then inquired as to what was in the cartons and were told that they contained ceramics. The defendant was then asked as to whether he had any papers with regard to the cargo, and the defendant responded that he did not. A request was then made to open one of the boxes, and defendant refused (Tr. 27, L.11 to L.15, Tr. 28, L.1 to L.5, June 8, 1976). Inspector Schilizzi then testified that he ultimately had Inspector Wood open one of the cartons.

On cross-examination, Inspector Schilizzi admitted that the defendant had told him that the ceramics belonged to his boss' wife and that at one juncture the defendant left to make a telephone call to his boss in order to determine whether he could permit the agents to open the cartons (Tr. 44, L.18 to L.21, Tr. 46, L.8 to L.25, Tr. 47, L.1, June 8, 1976). The defendant advised the agents that he otherwise had no authority to give them such permission (Tr. 48, L.11 to L.13, Tr. 49, L.11 to L.13, June 8, 1976). The testimony of Inspector Wood, as it did in the supression hearing, followed substantially that of Inspector Schilizzi. Based upon the information set forth, the agents opened and inspected one carton, finding the marijuana in question.

ARGUMENT

Point I

The Court in this case should review the Order of the Third Circuit Court of Appeals affirming the Judgment of Conviction in the District Court since the effect of the District Court's Opinion upholding the search performed by the Customs agents is to permit such agents to act far outside the scope of their statutory authority.

Title 19, United States Code, section 482, which pertains to customs searches, provides as follows:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is suspect to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. §3061.

19 C.F.R. §162.7 provides that:

> A customs officer may stop, search and examine any vehicle, person, or beast, or search any trunk or envelope

> wherever found, in accordance with section 3061 of the Revised Statutes (19 U.S.C. 482).

19 C.F.R. §162.5 provides:

> A customs officer may stop any vehicle or board any aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft.

It is perhaps of controlling significance to begin with a fundamental proposition which pervades all aspects of a customs agent's activities:

> . . . customs agents 'are not, like local or state police, general guardians of the public peace.' They are 'custom agents, with duties and powers limited to the activities of the type that the title implies.' [*United States v. Marjourau*, 474 F.2d 766, 770 (9th Cir. 1973).]

The functions of a customs agent are thus circumscribed, and moreover, as set forth above, carefully delineated by statute and regulation.

A customs agent's right to board or search an air craft, as opposed to a vessel or vehicle, is set forth solely in 19 C.F.R. §162.5, quoted above. An agent's right to board or search vessels or vehicles, as set forth in Title 19, U.S.C., §§482 and 1581 and 19 C.F.R. §§162.3 and 162.7 specifically excludes aircraft. See Title 19, U.S.C., §1401 (a)(b). Thus, while a customs agent may, without a warrant, board or search a vessel or vehicle "wherever found" where the agent has "reasonable cause to suspect" that it carries merchandise brought into the United States contrary to law, 19 C.F.R. §162.5 limits a customs agent's authority with regard to aircraft to those "arriving in the United States from a foreign country". A customs agent, therefore, has no right to stop or board a domestic aircraft, which is not arriving from a foreign destination, in order

to "examine the manifest and other documents or papers" or to search the aircraft. Arrival from a foreign destination is a *sine qua non* to the agent's right to inspect any of the aircraft's documents.

There exists not a single line of testimony, either at the suppression hearing or at trial, which indicates that any customs agent had in his possession at the time in question any information whatsoever indicating that the aircraft had arrived from a foreign destination. Indeed, the only testimony in the record indicates that the agents simply did not know the origin of the flight or were told by the defendant that he had arrived in Teterboro from Florida (S. Tr. 9, L.18 to L.23, A17a; S. Tr. 10, L.8, A181a; S. Tr. 13, L.19, A21a; S. Tr. 30, L.4 to L.16, A38a; S. Tr. 31, L.4 to L.8, A39a; S. Tr. 77, L.5, A85a; S. Tr. 78, L.1, A86a; S. Tr. 108, L.14, A116a).

The situation in the instant case mirrors that in *United States v. Ferrone*, 413 F. Supp. 408 (D.C. Puerto Rico 1975), wherein marijuana seized during unloading from an aircraft into an auto was suppressed due to the fact that the agents had no information regarding a foreign departure point for the aircraft. There, as here, the search should be overturned where the legal authority for a search cannot be found.

Point II

The District Court's Opinion, affirmed by the Third Circuit Court of Appeals, is in direct conflict with this Court's holdings in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

It is not denied that customs officers have the power in limited and carefully defined circumstances to conduct a "border search" on something less than probable cause,

that is, on reasonable suspicion of illegal activity. *United States v. Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. den.* 414 U.S. 1132 (1974). But the power to conduct a "border search" is "coextensive with the limits of our international border areas . . ." *United States v. Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968), *cert. den.* 393 U.S. 1121 (1969). Teterboro Airport is clearly not an international border area where the territory of the United States meets that of Canada or Mexico. Teterboro is not an international airport (19 C.F.R. §6.13); nor is it a port of entry (19 C.F.R. §1.2).

Neither can it be said that Teterboro Airport is the "functional equivalent" of a border. In *Almeida-Sanchez v. United States, supra*, this Court set forth three examples of "functional equivalents" of a border: (1) an established station near the border, (2) a point marking the confluence of two or more roads that extend from the border and (3) "a search of passengers and cargo of an airplane arriving at a Saint Louis airport after a *nonstop* flight from Mexico City." 413 U.S. at 272-273 (emphasis added). The flight here, manifestly, does not fall within the first two examples and, as defendant told the agents at the time of the events, originated in Florida and thus did not originate from a foreign nation (S. Tr. 78, L.1, A86a; S. Tr. 108, L.14, A116a; Stip. by gov't., S. Tr. 10A, L.9 to L.12, A165a).

The District Court found that Teterboro Airport was the "functional equivalent" of a border and customs agents there permitted to make border searches, on apparently two grounds: first, that "[p]ermanent facilities for inspection and clearance exist at Teterboro and customs inspectors are permanently assigned to that facility" (Appendix A, p. 7a) and secondly, that Teterboro somehow fits within the third example set forth in *Almeida-Sanchez, supra*. Both of these conclusions, it is respectfully submitted, are incorrect.

While the inspectors testified that there was a permanent customs office at Teterboro Airport, Inspector Schilizzi testified that the office was not always manned, but rather that the inspectors were on call to be there from their main office in Weehawken, New Jersey if a foreign arrival was due (S. Tr. 49, L.17, A57a). Indeed, Inspector Schilizzi testified that there were some days when the inspectors never went to Teterboro at all (S. Tr. 51, L.25, A59a; S. Tr. 52, L.2, A60a). Thus, while the office was permanent in the sense that room was reserved for customs, the presence of customs inspectors on any given day was far from certain.

It must also be clear that any airport which is not designated a port of entry or an international airport is only the "functional equivalent" of a border when it is accepting an international flight. Thus, to use the example in *Almeida-Sanchez,* a Saint Louis airport is the functional equivalent of a border when accepting a nonstop flight from Mexico, but it is not the functional equivalent of a border when accepting a flight from New York. If this were not true, every airport which ever accepted an international flight would become the functional equivalent of a border, a result which this Court clearly did not intend. Thus, for the flight in question here, which concededly began in Florida, Teterboro Airport cannot be construed as the functional equivalent of a border and must be construed as a non-border area.

Further, the facts adduced by the District Court demonstrate that the customs inspectors did not have specifically articulable facts that reasonably warranted a suspicion that the aircraft was a foreign arrival and, therefore, the agents' initial intrusion in questioning the defendant was impermissible. The facts regarding the initial intrusion in this case are rather simple. Inspector Schilizzi, in

his office, looked out his window and observed cartons being unloaded from a plane to a van (S. Tr. 6, L.10, A14a). He stated that he considered the unloading "unusual" because the aircraft was a passenger aircraft and men were quickly unloading a large amount of cartons (S. Tr. 8, L.24 to S. Tr. 9, L.8, A16a-17a). He suggested to the other inspectors that they go down and "check out" the activity (S. Tr. 9, L.18 to L.23, A17a). What was to be "checked out"? "If this was a foreign arrival or whatever it was" (S. Tr. 9, L.23, A17a). He was heading downstairs "[t]o find out where this flight was coming from." (S. Tr. 10, L. 8, A18a) (*see also* testimony of Inspector Wood), (S. Tr. 77, L.5 to S. Tr. 78, L.6 A85a-86a). The inspectors then accosted defendant, who identified himself as the pilot, asking the defendant "where he was from" (S. Tr. 13, L.19, A21a). The defendant responded that he was from "Ocala," Florida (S. Tr. 13, L.21, A21a). The inspector then made his first request for documents. Inspector Schilizzi later testified that when he left his office to approach the aircraft, the only fact available to him was that men were unloading a plane in a manner which attracted his attention and that he had no indication of the foreign or domestic nature of the flight (S. Tr. 31, L.4 to L.8, A31a). Inspector Schilizzi further testified that the pilot would have to *prove* to him that the cargo was domestic or he would open it (S. Tr. 30, L.8 to L.16, A38a).

There is not a sentence in the record which in any way indicates that any inspector had any information whatsoever which could be considered specifically articulable facts which would reasonably warrant a suspicion that the aircraft was a foreign arrival carrying goods from a foreign port. Without such facts in their possession, the customs inspectors had no right whatever to stop the defendant, question him and demand documents.

This Court, in *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) has clearly defined the rights of government agents operating in border-type situations to stop

and question persons in order to determine whether they had committed some violation of law within the agent's jurisdiction. In *Brignoni-Ponce,* Border Patrol agents were parked at the side of the road near a closed border checkpoint in California observing vehicles that passed by. The agents stopped defendant's car, questioned the defendant and his passengers about their citizenship, learning that the passengers were aliens who had entered the country illegally. The only admitted reason for the stop of the car was that the three occupants appeared to be of Mexican descent. The Court affirmed the decision of the Ninth Circuit Court of Appeals suppressing the statements obtained during the stop of the vehicle.

The government, the Court noted, had made a "convincing demonstration" that the public interest demanded effective measures to control the entry of illegal aliens from Mexico. 422 U.S. at 878. But the Court observed that against "this valid public interest we must weigh the interference with individual liberty" that results from the stop and questioning. (*Id.* at 879). The Court, after discussing the application of *Terry v. Ohio,* 392 U.S. 1 (1968), concluded:

> Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. [*Id.* at 884, footnote omitted.]

But the Court was unwilling to approve the actions of the Border Patrol agents in stopping the defendant's car based solely on the apparent Mexican ancestry of the occupants, stating that "this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country." (*Id.* at 886).

In the instant case the customs inspectors had absolutely no evidence before them, no specifically articulable facts, that could reasonably warrant a suspicion that the aircraft or its cargo had arrived from a foreign destination. Without that suspicion they had no right to stop and question the defendant. The facts here present even less of a case for a stop than that presented to the Court in *Brignoni-Ponce*, and the fruits of that unlawful stop should have been suppressed.

On the other hand, if Teterboro Airport is not a border area or the functional equivalent thereof, then the standard for search is probable cause, a standard that was unmet in the instant circumstances. In *Almeida-Sanchez, supra*, this Court found the statutory authority permitting searches by border patrol officers away from borders or the functional equivalent thereof to be insufficient to meet Fourth Amendment requirements. In such non-border circumstances, the Court held, "[i]n the absence of *probable cause* or consent, [the] search violate[s] the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures'." 413 U.S. at 273 [emphasis added].

In *Almeida-Sanchez*, the defendant was driving on a state highway in California some twenty-five miles from the Mexican border. He was stopped by a roving patrol of the United States Immigration Service, and his automobile was searched for aliens. The patrol had no warrant nor any reason to believe that an offense had been committed. In the course of the search, marijuana was found in the automobile. The basis for the search was 8 U.S.C. §1357(a) which provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulation. Regulation 8 C.F.R. §287.1 defined "a reasonable distance" as "within 100 air miles

from any external boundary of the United States." The statutory scope of the border patrol searches, while broad, is equally as expansive as the provision for customs searches under 19 U.S.C. §482, or 19 C.F.R. §162.5. Notwithstanding the apparent broad sweep of the statute, this Court found the scope of border patrol searches as set forth by statute too broad and held the search before it invalid. In language appropriate to the instant case, the Court held that the search, to be valid, must be within the proper scope of the searching agent's authority.

> In the present case . . . there was no . . . assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of the commission of an offense [412 U.S. at 271-272].

Similarly, in the case *sub judice,* there was no reason to believe that the defendant had crossed a border. Indeed, the agents were specifically told by defendant that he had begun his flight in Florida, a fact which the agents, by a mere telephone call, could have confirmed. Moreover, as in *Almeida-Sanchez,* not only was there no reason whatsoever to believe that defendant had crossed an international border, but there was absolutely no reason to believe he was guilty of the commission of an offense.

Finally, even if Teterboro Airport were the functional equivalent of a border, the evidence presented by the government was insufficient to justify a border search. In *United States v. Tilton,* 534 F.2d 1368 (9th Cir. 1976), *reh. den.* 534 F.2d 1363 (1976), for example, customs agents observed three persons towing a boat with trailer and observed the launching of the vessel into San Diego Bay. The customs agents' attention had been drawn to the boat because it was "a very fast ocean-going motorboat

capable of overnight trips to Mexico and of a type commonly used for smuggling." 534 F.2d at 1364. The agents also had information that the ship had been heading into Mexican waters at night.

The next day, a customs agent observed a pickup truck and trailer which appeared to be the one he saw the previous day. He and another agent observed the boat which had been launched the day before taken out of the water and loaded into the trailer. As soon as the boat was pulled off the ramp and into a nearby parking lot, the agents searched it, discovering 880 pounds of marijuana. The defendants were indicted and convicted of conspiracy to possess marijuana with intent to distribute, the district court holding the customs search valid.

The Ninth Circuit Court of Appeals reversed, refusing to accept the government's argument that "all vessels, whether or not there is any reason to believe that they had been in international waters, should be subject to search." *Id.* at 1365. Instead, the Court held that the search of a vessel in a harbor, which it deemed to be the functional equivalent of a border:

> may be valid as a border search . . . not only where . . . there is evidence to support a finding that the boat actually came from international or foreign waters, but also where there are articulable facts to support a reasonably certain conclusion by the customs officers that a vessel has crossed the border and entered our territorial waters . . . [*Id.* at 1366].

The Court noted that the "reasonably certain" standard was one higher than probable cause, stating that:

> . . . the totality of the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information be sufficient in the light

> of their experience to warrant a *firm* belief that a border crossing has occurred. *Cf. Carroll v. United States,* 267 U.S. 132, 162, 45 S. Ct. 280, 288, 69 L.Ed.2d 543, 555 (1925) [*Id.*, emphasis in original].

Once there is a reasonable certainty that the vessel had crossed a border, the vessel may be searched without any cause to believe a crime has been committed. *(Id.)*

The simple fact of cargo being unloaded from a plane manifestly does not rise to the level of reasonable certainty, nor probable cause, nor founded suspicion, nor real suspicion, nor indeed, even mere suspicion. It is at best a "hunch", and a "hunch" is a far cry away from a firm belief based upon articulable facts that give rise to reasonable certainty.

Under the facts of this case, there was absolutely no legal basis for any search by the customs agents. The agents took a risk, searching without authority or justification. They must be satisfied with having uncovered the marijuana, but the "search and seizure is not to be justified by evidence which is uncovered in the search." *United States v. Haala,* Cir. 532 F.2d 1324, 1327 (10th Cir. 1976), *reh. den.* 532 F.2d 1324 (1976).

CONCLUSION

WHEREFORE, in view of the foregoing, it is respectfully requested that the Supreme Court of the United States issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review the aforementioned issues.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America, Plaintiff,

v.

Errol Jay MIRMELLI, Defendant.

Crim. No. 7-123.

United States District Court,
D. New Jersey.

July 29, 1976.

In prosecution for traveling in interstate commerce for the purpose of distributing 1,695 pounds of marijuana and for possessing the same with intent to distribute, defendant moved to suppress evidence. The District Court, Lacey, J., held that where aircraft with long range capacity landed at a "landing rights airport" in New Jersey at which aircraft from abroad often landed, defendant and his companions were observed rapidly unloading cartons from passenger plane in an area to which foreign flights were commonly directed, and customs inspectors, unless notified by pilot, would be unaware of whether flight or cargo was foreign unless they approached pilot and asked questions, customs agents had a reasonable belief that the containers being unloaded by defendant might contain illegal goods from abroad, and were therefore justified in stopping and questioning him, but thereafter it was necessary to find that probable cause existed for search of one of the cartons; and that when defendant was then unable to produce documentation for cargo, claimed that cartons which were being tossed rather than carefully placed contained ceramics, and disclaimed lack of knowledge as to destination, there was probable cause to search one of the cartons.

Motion denied.

1. *Customs Duties Key 126*

Teterboro Airport, New Jersey, which was a "landing rights airport" at which there existed permanent facilities for inspection and clearance, with customs inspectors permanently assigned to that facility, was the functional equivalent of the border, and customs officials there was empowered to perform border searches.

2. *Customs Duties Key 126*

Searches and Seizures Key 7(1)

Broad interpretation is to be given statutory powers of customs officials and special standards are applied to their searches and seizures at borders and international airports, but the Fourth Amendment imposes limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. U.S.C.A. Const. Amend. 4.

3. *Searches and Seizures Key 7(1)*

In delineating the constitutional safeguards applicable in particular contexts, court must weigh the public interest against the Fourth Amendment interest of the individual. U.S.C.A. Const. Amend. 4.

4. *Customs Duties Key 126*

Some quantum of individualized suspicion was prerequisite to a constitutional search and seizure by customs officials with respect to aircraft at a "landing rights airport," though the Fourth Amendment imposes no irreducible requirement of such suspicion; whether suspicion be labelled "reasonable" or "founded," the requirement was that the officers be able to point to specific and

articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. U.S.C.A. Const. Amend. 4.

5. *Customs Duties Key 126*

Where aircraft with long range capacity landed at a "landing rights airport" in New Jersey at which aircraft from abroad often landed, defendant and his companions were observed rapidly unloading cartons from passenger plane in an area to which foreign flights were commonly directed, and customs inspectors, unless notified by pilot, would be unaware of whether flight or cargo was foreign unless they approached pilot and asked questions, customs agents had a reasonable belief that the containers being unloaded by defendant might contain illegal goods from abroad, and were therefore justified in stopping and questioning him, but thereafter it was necessary to find that probable cause existed for search of one of the cartons. Tariff Act of 1930, §467 as amended 19 U.S.C.A. §1467.

6. *Customs Duties Key 126*

Where customs agents, acting on reasonable suspicion, approached pilot of aircraft arriving at a "landing rights airport" and requested documentation for cargo that was being unloaded, and where defendant could produce none, stated that cartons which were being tossed into van rather than carefully placed contained ceramics, and claimed lack of knowledge of cartons' destination, customs agents had probable cause for search of one of the cartons. U.S.C.A. Const. Amend. 4.

7. *Searches and Seizures Key 3.3(2)*

Probable cause for search does not require the same type of specific evidence of each element of the offense as

would be needed to support a conviction; rather, a court must deal with probabilities.

8. *Criminal Law Key 394.2(1)*

Activities of customs inspectors or any government agents, as distinguished from those of private persons, come within the boundaries of exclusionary rule if their conduct is violative of the Fourth Amendment. U.S.C.A. Const. Amend 4; Fed. Rules Crim. Proc. rules 12(b), 41(f), 18 U.S.C.A.

9. *Searches and Seizures Key 7(10)*

For purposes of determining reasonableness of search, where box was on the ground moving from airplane to van at airport, a lesser expectancy of privacy was warranted than in the case of a house search. U.S.C.A. Const. Amend. 4.

Jonathan L. Goldstein, U.S. Atty., by Kevin R. March, Asst. U.S. Atty., Newark, N.J. for plaintiff.

Lowenstein, Sandler, Brochin, Kohl & Fisher, by Matthew P. Boylan, Newark, N.J., for defendant.

OPINION

LACEY, District Judge.

On May 24, 1976, a motion was made by defendant Mirmelli to suppress evidence obtained in the above-entitled case pursuant to Rules 41(f) and 12(b) of the Federal Rules of Criminal Procedure. A hearing on the motion took place on March 24 and continued to March 25, 1976, prior to the commencement of trial. At the conclusion of the hearing the motion was denied based on the following findings of fact and conclusions of law.

Defendant Mirmelli, on March 22, 1976, piloted an aircraft N815G which departed Opa Locka Airport, Opa Locka, Florida, his flight plan indicating that his destination was Portland International Jetport, Portland, Maine. Stipulation of June 9, 1976. During the flight, the flight plan was amended to reflect that defendant was to land at Teterboro Airport, Teterboro, New Jersey. *Id.* At approximately 1:15 p.m., the aircraft landed at Teterboro Airport and taxied to the Atlantic Aviation area where defendant signed in. A blue Dodge van with New York registration arrived and defendant and three companions began to unload the cargo from the plane into the van. The cargo consisted of approximately 53 numbered boxes. Approximately 35-40 feet away, through a window in the Customs Office, customs inspectors observed defendant and his companions unloading the aircraft. They approached the aircraft and questioned defendant as to the contents of the boxes and the point of origin of both the flight and the cargo. Defendant responded that the boxes contained ceramics and that he had flown up from Florida. The inspectors requested invoices or bills of lading, to which defendant responded that he had none and was unaware of the destination of the boxes. When defendant

was asked to open one of the boxes, he refused. Inspector Wood opened one box and found that it contained marijuana. All 53 boxes when opened were found to contain marijuana.

On March 30, 1976, the Grand Jury returned an indictment against defendant charging him with travelling in interstate commerce for the purpose of distributing 1,695 pounds of marijuana and with carrying on said unlawful activity in violation of 18 U.S.C. §1952. Count II charged him with the knowing possession with the intent to distribute approximately 1,695 pounds of marijuana in violation of 21 U.S.C. §841(a)(1).

Defendant's motion to suppress is based on two grounds. Defendant argues that the search performed by the customs agents violated the fourth amendment in that the agents did not have the requisite probable cause to support the search. While conceding that customs agents can predicate a border stop on reasonable suspicion rather than probable cause, he denies that the questioning of defendant amounted to a border stop. Finally defendant contends that even if the reasonable suspicion test was applicable, that standard was not met.

Two types of airports provide for international air traffic. Aircraft arriving from a foreign country may land at either an "international airport" as that term is designated in 19 C.F.R. §6.13 or a "landing rights airport." According to the Customs Guide for Private Flyers, published by the Department of Treasury, United States Customs Service, at 3 (1973):

> The term "landing rights airport" means an airport at which permission to land may be granted by the appropriate Customs officer with the concurrence of the Immigration and Naturalization Service, the Public

> Health Service, and the Animal and Plant Health Inspection Service of the Department of Agriculture. Such landing rights are required before an aircraft may land at an airport which has not been designated for Customs purposes as an international airport.

[1] Permanent facilities for inspection and clearance exist at Teterboro and customs inspectors are permanently assigned to that facility. *See* Customs Guide at 25. The Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1975), provided that a routine border search may take place at the border itself or at its "functional equivalents." As an example it specified that:

> a search of the passengers and cargo of an airplane arriving at St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

Id. Teterboro Airport, then, is the functional equivalent of the border and customs officials there are empowered to perform border searches.

[2] Because of the peculiar problems faced by customs officials in policing borders and international airports, broad interpretation is given to their statutory powers and special standards are applied to their searches and seizures at these places. *United States v. Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121, 89 S. Ct. 999, 22 L.Ed.2d 126 (1969). The fourth amendment, however, imposes limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Ortiz*, 422 U.S. 891, 895, 95 S.Ct. 2585, 45 L.Ed.2d 623

(1975); *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

[3] In delineating the constitutional safeguards applicable in particular contexts, the court must weigh the public interest against the fourth amendment interest of the individual. *United States v. Brignoni-Ponce, supra*, 422 U.S. at 878, 95 S.Ct. 2574; *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

I note here the substantiality of the public interest in the practice of routine checks for inquiry at border checkpoints, a practice identified as very important from the standpoint of inhibiting illegal drug traffic. While the need to prevent drug traffic is great, the consequent intrusion on fourth amendment interests is rather limited. The stop does intrude to a limited extent on a right to "free passage without interruption," *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 69 L.Ed. 543 (1925). But the detention is a brief one during which, like that requirement in *United States v. Brignoni-Ponce, supra*, 422 U.S. at 880, 95 S.Ct. at 2580, for an illegal aliens search, all that is required of the pilot is "a response to a brief question or two and possibly the production of a document" evidencing citizenship or the fact that the flight was not international.

[4] Some quantum of individualized suspicion is a prerequisite to a constitutional search and seizure in these circumstances although "the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, — U.S. —, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976). *See also Almeida-Sanchez v. United States, supra*, 413 U.S. at 283-85, 93 S. Ct. at 2535 (Powell, J., concurring); *id.* at 288, 93 S.Ct. at 2535 (White, J., dissenting); *United States v. Biswell*, 406 U.S. 311, 315-16, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); *Colonnade Catering*

Corp. v. United States, 397 U.S. 72, 76-77, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); *Camara v. Municipal Court, supra*, 387 U.S. at 529-30, 87 S.Ct. 1727; *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

Whether it is labelled "reasonable" suspicion, *see United States v. Brignoni-Ponce, supra*, 422 U.S. at 878, 95 S.Ct. 2574; *Terry v. Ohio, supra*, 392 U.S. 21, 88 S.Ct. 1868, or "founded" suspicion, *see United States v. Rocha-Lopez*, 527 F.2d 476, 477 (9th Cir. 1976); *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966), the requirement is that the officers "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio, supra*, 392 U.S. at 21, 88 S.Ct. at 1880.

[5] As mentioned earlier, Teterboro Airport is a landing rights airport and aircraft from abroad often land there. Transcript of Suppression Hearing at 52. The Customs Service maintains permanent facilities there. *Id.* at 106. Customs agents at the airport are present for the purpose and are highly trained in the art of detecting illegal importations. 19 C.F.R. §162.6 (1975). Customs agents are specifically authorized to inspect, examine and search "persons, baggage and merchandise" when a vessel from a foreign country arrives, whether directly or via another place in the United States, under section 467 of the Tariff Act of 1930, as amended, 19 U.S.C. §1467 (1970). The government has a legitimate concern that materials from abroad will be smuggled in. The plane flown by defendant, a Howard 350 Aircraft, has a long range capacity, according to Deputy Chief Inspector Malone, Transcript at 116, and is therefore capable of bringing in goods from abroad.

The three customs inspectors, Schilizzi, O'Leary and Wood, observed defendant and his companions unloading

cartons from a passenger plane. They viewed this occurence as unusual in that there was a large number of cartons being loaded into the van in a hasty fashion. *Id.* at 9, 76. Inspector Schilizzi noted that this size cargo would normally come on a cargo rather than passenger aircraft. *Id.* at 9. In fact, Teterboro does not have cargo facilities. *Id.* at 76. They in turn, noticed that defendant and his companions were rapidly unloading the cartons which increased their suspicions. *Id.* at 9, 76. The aircraft was parked in an area to which Atlantic Aviation directs foreign flights. *Id.* at 54-55. In addition, in many cases, unless a pilot notifies customs of his or her flight and arrival, the inspectors are unaware whether a flight or cargo is foreign unless they approach the pilot and ask questions. *Id.* at 3-4, 107.

In *United States v. Brignoni-Ponce, supra,* the Supreme Court held that a roving patrol of the Border Patrol, which stopped defendants near the Mexican border and questioned them about their citizenship when the only ground for suspicion was that the occupants of the vehicle appeared to be of Mexican ancestry, was violative of the fourth amendment. It provided that, because of the importance of the governmental interest in preventing the illegal entry of aliens at the border, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, when an officer's observations lead him or her to suspect that a particular vehicle may contain illegal aliens, the officer may stop the car briefly and investigate the circumstances that provoke suspicion, but random seaches without any reason to suspect illegal activity is unreasonable under the fourth amendment. 422 U.S. at 878-81, 95 S.Ct. 2574. *See also United States v. Moffett,* 522 F.2d 1379, 1381 (5th Cir. 1975); *United States v. Walker,* 522 F.2d 194, 196 (5th Cir. 1975). Any further

detention or search must be based on consent or probable cause. 422 U.S. at 882, 95 S.Ct. 2574.

In *United States v. Walker, supra,* the court elaborated upon a number of factors which may be taken into account in deciding whether reasonable suspicion exists to stop a car in the border area: the characteristics of the area where the car is encountered, its proximity to the border, the usual patterns of traffic on that particular road, previous experience with alien traffic, the driver's behavior (erratic or evasive), whether the vehicle appears overloaded or has an unusual number of people. 522 F.2d at 196. *See also United States v. Diaz,* 503 F.2d 1025, 1026 (3d Cir. 1974); *United States v. Beck,* 483 F.2d 203, 207 (3d Cir. 1973), *cert. denied,* 414 U.S. 1132, 94 S.Ct. 873, 38 L.Ed.2d 757 (1974).

In *United States v. Rocha-Lopez,* 527 F.2d 476 (9th Cir. 1976), the court found that the agent was legally justified in stopping defendant's car and indicated that it was irrelevant that the defendant was ultimately convicted of possession of marijuana rather than alien smuggling, which was the original reason for the stop. At the time of the stop, a reasonable suspicion had existed that aliens were being imported. *Id.* at 478. *See also United States v. Rodriguez-Alvarado,* 510 F.2d 1063, 1064 (9th Cir. 1975).

In consideration of the above-mentioned points and analyses, I find that the factors relied upon *sub judice* supported a reasonable belief by the customs agents that the containers being unloaded by defendant contained illegal goods from abroad and they were therefore justified in stopping and questioning him.

[6] Thereafter, it is necessary to find that probable cause existed for a search of one of the cartons by the customs agents and I so find based on this set of facts.

The inspectors, after observing defendant and his companions, approached them and identified themselves as customs inspectors. Transcript at 13. Defendant responded that he was from Florida and that they "had nothing to do with this flight." *Id.* at 77-78. Two of the agents stated that they sensed defendant's resentment to their intrusion. *Id.* at 34-91-2. Moreover, they noticed that the pace of the loading increased during their conversation. *Id.* at 32. They then requested defendant produce documentation, in the form of invoices, waybills and the like, to indicate that his flight was domestic rather than foreign. Defendant could produce none. *Id.* at 14-15, 78. Neither Inspectors Schillizzi nor Wood had encountered a situation where a pilot had no documents for his cargo even when the cargo was being transported for his own company. *Id.* at 46-47, 78-79.

Defendant was then asked the contents of the cartons to which he replied that they contained ceramics, the "life's work" of his boss' wife which were to be put on display in New York. *Id.* at 16, 79. The inspectors noted, however, that the cartons were being tossed rather than carefully placed as would naturally take place with such a shipment. *Id.* at 14, 39, 79. Neither defendant nor his companions knew the destination of the shipment. *Id.* at 16-17.

Inspector Wood noticed the rental agreement for the van on the sun visor which indicated that the purpose of the rental was to move musical instruments. *Id.* at 18-19. Defendant refused to open the carton and requested permission to call his boss at which time the inspectors decided to call their supervisor. *Id.* at 19-20, 82. After a description of the aircraft was given to him over the telephone, Deputy Chief Inspector Malone responded that the description of the aircraft matched a customs profile of aircraft used in smuggling operations. *Id.* at 20-21, 109,

116-17. Malone then ordered Inspector Schillizzi to open and inspect one carton which had not been loaded onto the van. *Id.* at 21-22, 110. Defendant returned stating that he could not reach his boss. The carton was opened by the agents and found to contain a brown vegetative substance, *id.* at 22, 83, which was later stipulated to be marijuana. *Id.* at 22. In total, approximately 1,694 pounds of marijuana were discovered.

The customs agents were told that the materials were ceramics and domestic in origin. Their trained observation led them to believe the former assertion was a falsehood and that the contents were not ceramics. Therefore, the origin of the cartons was also in doubt. Defendant's lack of knowledge as to the destination of the delivery compounded their suspicions. Defendant, who testified at the hearing, did not contradict the testimony of the customs inspectors with respect to any of the above-mentioned series of events. He did not explain where the marijuana was obtained or where it was to be delivered.

The reasonable deduction from this set of facts is that defendant knew the destination and contents of the cartons but did not want to divulge that information. The cartons placed on the van in such a hurried manner were to be taken somewhere. Defendant identified the property as belonging to his "boss." Yet no "boss" was identified, no location of an office was mentioned, and no company name was given.

[7] The Supreme Court has stated that probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972); *Draper v. United States*, 358 U.S. 307, 311-12, 79 S. Ct. 329, 3 L.Ed.2d 327 (1959). Rather, a court must deal with probabilities. " '[T]hey are

the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act'." *Adams v. Williams, supra,* 407 U.S. at 149, 92 S. Ct. at 1925 (citing *Brinegar v. United States,* 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L.Ed. 1879 (1949).

In the context of this case, they are the considerations of the reasonable and prudent customs inspectors which must be evaluated. These facts are unlike those in *United States v. Portillo-Reyes,* 529 F.2d 844 (9th Cir. 1975), for example, where the requisite probable cause was found not to to exist. The court held that the border patrol agents had reasonable grounds for a founded suspicion that defendant's vehicle was connected with the illegal entry of aliens. *Id.* at 849. However, that suspicion was not converted into probable cause for the arrest made, in that the defendant was cooperative, responsive to the questions asked by the agents and there was no hint of deception. *Id.* at 890-51.

Under this test the totality of the circumstances indicated probable cause for the inspectors to believe that defendant was transporting articles subject to customs inspection and possibly contraband.

[8] The activities of customs inspectors or any government agents, as distinguished from those of private persons, come within the boundaries of the exclusionary rule if the conduct is violative of the fourth amendment. *Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *United States v. Valen,* 479 F.2d 467, 469 (3d Cir. 1973), *cert. denied,* 419 U.S. 901, 95 S.Ct. 185, 42 L.Ed.2d 147 (1974). In a line of recent cases the Supreme Court has taken a sterner look at the exclusionary rule. While explaining that the prime purpose of the exclusionary rule is to deter future unlawful conduct, it has

emphasized that that purpose must be balanced against other interests, for example, the substantial societal costs of applying the rule. See *Stone v. Powell*, – U.S. –, 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976); *United States v. Janis*, – U.S. –, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). When they are balanced, the Court has found the furtherance of fourth amendment goals outweighed by the detriment to the criminal justice system. *Stone v. Powell, supra*, at –, 96 S.Ct. 3037; *United States v. Janis, supra, at* –, 96 S.Ct. 3021. The Court in *Stone* went even further in its argument, asserting that the guilt or innocence should be the central concern in a criminal case. Often the application of the exclusionary rule instead "deflects the truthfinding process and often frees the guilty." At –, 96 S.Ct. at 3050. While it may deter unlawful police activity, indiscriminate application of the rule may generate disrespect for the law and the administration of justice. *Id.*

[9] It is not without significance that the box that was opened on the ground, moving from the airplane to the van. Obviously, a lesser expectancy of privacy is warranted than were this a house search. *See South Dakota v. Opperman*, – U.S. –, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

I find that in light of the facts before me that reasonable suspicion existed for a stop of defendant and that suspicion matured into probable cause to search the cartons defendant was unloading. *See United States v. Moffett, supra*, at 1381; *United States v. Walker, supra*, 196; *United States v. Rodriguez-Alvarado, supra*, at 1064.

I conclude, therefore, that defendant's motion to suppress the marijuana obtained from the search by customs inspectors must be denied and an appropriate order will be entered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 76-2121

UNITED STATES OF AMERICA,

vs.

ERROL JAY MIRMELLI,

Appellant.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 76-123-1)

Argued May 5, 1977

Before: ALDISERT and ADAMS, *Circuit Judges* and
FOGEL, *District Judge.**

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: (1) the search performed by customs agents in the instant case violated the Fourth Amendment to the Constitution of the United States and the fruits thereof should have been suppressed because (a) the initial intrusion by the customs agents in stopping defendant and demanding documents from him was beyond the agents' statutory authority and was therefore unlawful, (b) irrespective of the inspectors' statutory authority, no grounds existed to justify the actions of the inspectors in interrogating defendant and searching the cartons unloaded from the plane, (c) even if Teterboro Airport were the functional equivalent

* Honorable Herbert A. Fogel, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

of a border, the evidence presented by the government was insufficient to justify a border search; (2) the conviction of defendant on Count I of the indictment should be reversed because of the government's failure to prove all elements of the offense charge in that (a) the government failed to prove that the defendant was engaged in a "business enterprise" as required by Title 18, United States Code, Section 1952, (b) the government failed to prove that the defendant "thereafter" performed an act promoting, managing, establishing or carrying on "said unlawful activity"; (3) the lower court's refusal to grant a directed verdict of acquittal at the close of the government's case was plain error; (4) the comments to the jury made by the trial judge during his review of the evidence unfairly prejudiced the defendant, denying him a fair trial, specifically, the trial judge's comments concerning the existence of defendant's "boss" were unduly prejudicial; and (5) the present statutory classification of marijuana under The Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 is contrary to the criteria of §812(b) and §811(c) of 21 United States Code, and (a) prosecution of offenses relating to marijuana under Schedule I of The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §801, *et seq.*, is inconsistent with the legislative intent and the purposes of the act, (b) the failure to reassign marijuana to Schedule V, consistent with the statutory mandate to punish according to harm, violates substantive due process under the Fifth Amendment, (c) classification of marijuana as a Schedule I drug violates the equal protection and due process guarantees of the Fifth Amendment, and (d) continued classification of marijuana in Schedule I constitutes an abuse of the Attorney General's discretion and prosecutions under that section are illegal; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ R. J. Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN,
Clerk

Dated: May 6, 1977